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# Cash or Deferred Arrangement (CODA) Listing of Required Modifications and Information Package

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Cash or Deferred Arrangement (CODA)  
Listing of Required Modifications and Information Package  
(LRMs)  
(For use with master or prototype ("M&P") plans intending to  
satisfy the requirements of Code §§ 401(k) and 401(m))

This information package contains samples of plan provisions that satisfy certain specific requirements of the Internal Revenue Code, as amended through the Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105-206). Such language may or may not be acceptable in specific plans, depending on the context.

Since a qualified CODA must be part of a defined contribution plan meeting the requirements of Code § 401(a), the plan submitted must also be compared to the Defined Contribution Plan LRMs and must otherwise satisfy the M&P requirements set forth in Rev. Proc. 2000-20, 2000-6 I.R.B. 553.

We have prepared this package to assist sponsors who are drafting plans. To expedite the review process, sponsors are encouraged to use the language in this package.

LRMs XIX and XX are new. Underlined material reflects other changes to the 12-1991 version of this LRM.

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(I) ADOPTION STATEMENT

Statement of Requirement: The provisions of the CODA may be made effective as of the first day of the Plan Year in which the CODA is adopted, but under no circumstances may a salary reduction agreement or other deferral mechanism be adopted retroactively. In addition, a plan intending to satisfy the requirements of Code §§ 401(k)(12) and 401(m)(11) (a "Safe Harbor CODA") generally must satisfy such requirements, including the notice requirement, for the entire Plan Year. See Notice 98-52, 1998-46 I.R.B. 16, Notice 2000-3, 2000-4 I.R.B. 413, and Rev. Proc. 2000-20, 2000-6 I.R.B. 553, for more information on Safe Harbor CODAs.

(II) PARTICIPATION AND COVERAGE [Code §§ 401(k)(2)(D) and 401(k)(4)]

Statement of Requirement: An employee's eligibility to make Elective Deferrals under a CODA may not be conditioned upon the completion of more than 1 year of service or the attainment of more than age 21. An employee's eligibility to receive Matching Contributions, Qualified Matching Contributions, or Qualified Non-elective Contributions may be conditioned upon the completion of up to 2 years of service. No contributions or benefits (other than Matching Contributions or Qualified Matching Contributions) may be conditioned upon an employee's Elective Deferrals.

(III) ELECTIVE DEFERRALS [Code § 401(k)]

Statement of Requirement: The plan must provide a means by which an employee who is eligible to participate in the CODA may elect to have the employer make payments either (1) as contributions to a trust under the plan on behalf of the employee in accordance with a salary reduction agreement, or some other deferral mechanism, or (2) to the employee directly in cash.

The plan must specify a reasonable period at least once each calendar year during which a participant may elect to commence Elective Deferrals. Such election may not be made retroactively. A participant's election to commence Elective Deferrals must remain in effect until modified or terminated.

The plan must also specify a reasonable period at least once each calendar year during which a participant may elect to terminate an election or to modify the amount or frequency of his or her Elective Deferrals.

A plan that provides for negative elections, whereby a stated amount is automatically withheld from a participant's salary and contributed to the plan as an Elective Deferral unless he or she affirmatively elects a different amount (including no amount), must contain language that meets the requirements of Revenue Ruling 2000-8, 2000-7 I.R.B. 617.

(IV) ELECTIVE DEFERRALS -- CONTRIBUTION LIMITATION  
[Code §§ 402(g) and 401(a)(30)]

Statement of Requirement: Elective Deferrals by a participant may not exceed the dollar limit in effect under Code § 402(g) in any taxable year.

Sample Plan Language:

No participant shall be permitted to have Elective Deferrals made under this plan, or any other qualified plan maintained by the employer, during any taxable year, in excess of the dollar limitation contained in § 402(g) of the Code in effect at the beginning of such taxable year.

(V) DISTRIBUTION OF EXCESS ELECTIVE DEFERRALS [Code §§ 401(a)(30) and 402(g)]

Statement of Requirement: A mechanism must be provided by which a participant may notify or be deemed to notify the plan administrator of Excess Elective Deferrals and upon such notice, but prior to April 15 of the year following the year in which the deferrals were made, the Excess Elective Deferrals and any earnings thereon will be distributed. Deemed notification occurs if Excess Elective Deferrals arise solely from Elective Deferrals made under the plan or plans of the employer.

Sample Plan Language:

A participant may assign to this plan any Excess Elective Deferrals made during a taxable year of the participant by notifying the plan administrator on or before the date specified in the adoption agreement of the amount of the Excess Elective Deferrals to be assigned to the plan. A participant is deemed to notify the plan administrator of any Excess Elective Deferrals that arise by taking into account only those Elective Deferrals made to this plan and any other plans of the employer.

Notwithstanding any other provision of the plan, Excess Elective Deferrals, plus any income and minus any loss allocable thereto, shall be distributed no later than April 15 to any participant to whose account Excess Elective Deferrals were assigned for the preceding year and who claims Excess Elective Deferrals for such taxable year.

Definitions:

1. "Elective Deferrals" shall mean any employer contributions made to the plan at the election of the participant, in lieu of cash compensation, and shall include contributions made pursuant to a salary reduction agreement or other deferral mechanism. With respect to any taxable year, a participant's Elective Deferrals is the sum of all employer contributions made on behalf of such participant pursuant to an election to defer under any qualified CODA described in § 401(k) of the Code, any salary reduction simplified employee pension described in § 408(k)(6), any SIMPLE IRA Plan described in § 408(p), any eligible deferred compensation plan under § 457, any plan described under § 501(c)(18), and any employer contributions made on the behalf of a participant for the purchase of an annuity contract under § 403(b) pursuant to a salary reduction agreement. Elective Deferrals shall not include any deferrals properly distributed as excess annual additions.

2. "Excess Elective Deferrals" shall mean those Elective Deferrals that are includible in a participant's gross income under § 402(g) of the Code to the extent such participant's Elective Deferrals for a taxable year exceed the dollar limitation under such Code section. Excess Elective Deferrals shall be treated as annual additions under the plan, unless such amounts are distributed no later than the first April 15 following the close of the participant's taxable year.

**[Note: Excess Elective Deferrals that are distributed after April 15 are includible in the participant's gross income in both the taxable year in which deferred and the taxable year in which distributed.]**

Determination of income or loss: Excess Elective Deferrals shall be adjusted for any income or loss up to the date of distribution. The income or loss allocable to Excess Elective Deferrals is the sum of: (1) income or loss allocable to the participant's Elective Deferral account for the taxable year multiplied by a fraction, the numerator of which is such participant's Excess Elective Deferrals for the year and the denominator is the participant's account balance attributable to Elective Deferrals without regard to any income or loss occurring during such taxable year; and (2) 10 percent of the amount determined under (1) multiplied by the number of whole

calendar months between the end of the participant's taxable year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.

[Note to reviewer: A plan may use any reasonable method for computing the income or loss allocable to Excess Elective Deferrals, provided such method is used consistently for all participants and for all corrective distributions under the plan for the Plan Year, and is used by the plan for allocating income or loss to participants' accounts. Income or loss allocable to the period between the end of the taxable year and the date of distribution may be disregarded in determining income or loss.]

**Sample Adoption Agreement Language:**

Participants who claim Excess Elective Deferrals for the preceding taxable year must submit their claims in writing to the plan administrator by [ ] [SPECIFY A DATE BEFORE APRIL 15].

(VI) **ACTUAL DEFERRAL PERCENTAGE TEST** [Code §§ 401(a)(4) and 401(k)(3); Notice 97-2, 1997-1 C.B. 348 and Notice 98-1, 1998-3 I.R.B. 42]

**Statement of Requirement:** Elective Deferrals must meet the nondiscrimination requirements of Code §§ 401(a)(4) and 401(k)(3) of the Code.

**Sample Plan Language:**

Prior Year Testing

The Actual Deferral Percentage ("ADP") for a Plan Year for participants who are Highly Compensated Employees for each Plan Year and the prior year's ADP for participants who were Non-highly Compensated Employees for the prior Plan Year must satisfy one of the following tests:

1. The ADP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ADP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 1.25; or

2. The ADP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ADP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 2.0, provided that the ADP for participants who are Highly Compensated Employees does not exceed the ADP for participants who were



Non-highly Compensated Employees in the prior Plan Year by more than 2 percentage points.

For the first Plan Year the plan permits any participant to make Elective Deferrals and this is not a successor plan, for purposes of the foregoing tests, the prior year's Non-highly Compensated Employees' ADP shall be 3 percent unless the employer has elected in the adoption agreement to use the Plan Year's ADP for these participants.

#### Current Year Testing

If elected by the employer in the adoption agreement, the ADP tests in 1 and 2, above, will be applied by comparing the current Plan Year's ADP for participants who are Highly Compensated Employees with the current Plan Year's ADP for participants who are Non-highly Compensated Employees. Once made, this election can only be undone if the plan meets the requirements for changing to Prior Year Testing set forth in Notice 98-1 (or superseding guidance).

#### Special Rules:

1. A participant is a Highly Compensated Employee for a particular Plan Year if he or she meets the definition of a Highly Compensated Employee in effect for that Plan Year. Similarly, a participant is a Non-highly Compensated Employee for a particular Plan Year if he or she does not meet the definition of a Highly Compensated Employee in effect for that Plan Year.

2. The ADP for any participant who is a Highly Compensated Employee for the Plan Year and who is eligible to have Elective Deferrals (and Qualified Non-elective Contributions or Qualified Matching Contributions, or both, if treated as Elective Deferrals for purposes of the ADP test) allocated to his or her accounts under two or more arrangements described in § 401(k) of the Code, that are maintained by the employer, shall be determined as if such Elective Deferrals (and, if applicable, such Qualified Non-elective Contributions or Qualified Matching Contributions, or both) were made under a single arrangement. If a Highly Compensated Employee participates in two or more cash or deferred arrangements that have different Plan Years, all cash or deferred arrangements ending with or within the same calendar year shall be treated as a single arrangement. Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under regulations under § 401(k) of the Code.

3. In the event that this plan satisfies the requirements of § 401(k), 401(a)(4), or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this plan, then this section shall be applied by determining the ADP of employees as if all such plans were a

single plan. Any adjustments to the Non-highly Compensated Employee ADP for the prior year will be made in accordance with Notice 98-1 and any superseding guidance, unless the employer has elected in the adoption agreement to use the Current Year Testing method. Plans may be aggregated in order to satisfy § 401(k) of the Code only if they have the same Plan Year and use the same ADP testing method.

4. For purposes of determining the ADP test, Elective Deferrals, Qualified Non-elective Contributions and Qualified Matching Contributions must be made before the end of the 12-month period immediately following the Plan Year to which the contributions relate.

5. The employer shall maintain records sufficient to demonstrate satisfaction of the ADP test and the amount of Qualified Non-elective Contributions or Qualified Matching Contributions, or both, used in such test.

Definition:

1. "Actual Deferral Percentage" shall mean, for a specified group of participants for a Plan Year, the average of the ratios (calculated separately for each participant in such group) of (1) the amount of employer contributions actually paid over to the trust on behalf of such participant for the Plan Year to (2) the participant's Compensation for such Plan Year. Employer contributions on behalf of any participant shall include: (1) any Elective Deferrals made pursuant to the participant's deferral election (including Excess Elective Deferrals of Highly Compensated Employees), but excluding (a) Excess Elective Deferrals of Non-highly Compensated Employees that arise solely from Elective Deferrals made under the plan or plans of this employer and (b) Elective Deferrals that are taken into account in the Contribution Percentage test (provided the ADP test is satisfied both with and without exclusion of these Elective Deferrals); and (2) if elected by the employer in the adoption agreement, Qualified Non-elective Contributions and Qualified Matching Contributions. For purposes of computing Actual Deferral Percentages, an employee who would be a participant but for the failure to make Elective Deferrals shall be treated as a participant on whose behalf no Elective Deferrals are made.

**Sample Adoption Agreement Language:**

Qualified Matching Contributions and Qualified Non-elective Contributions may be taken into account as Elective Deferrals for purposes of calculating the Actual Deferral Percentages. In determining Elective Deferrals for the purpose of the ADP test, the employer shall include [ELECT, AS APPROPRIATE]:

☐ a. Qualified Matching Contributions

☐ b. Qualified Non-elective Contributions

under this plan or any other plan of the employer.

The amount of Qualified Matching Contributions made under section ☐ of the plan and taken into account as Elective Deferrals for purposes of calculating the Actual Deferral Percentage shall be:

☐ a. All such Qualified Matching Contributions.

☐ b. Such Qualified Matching Contributions that are needed to meet the Actual Deferral Percentage test stated in section ☐ of the plan. (Box b can only be checked if the employer has elected in the adoption agreement to use the Current Year Testing method.)

The amount of Qualified Non-elective Contributions made under section ☐ of the plan and taken into account as Elective Deferrals for purposes of calculating the Actual Deferral Percentages shall be:

☐ a. All such Qualified Non-elective Contributions.

☐ b. Such Qualified Non-elective Contributions that are needed to meet the Actual Deferral Percentage test stated in section ☐ of the plan. (Box b can only be checked if the employer has elected in the adoption agreement to use the Current Year Testing method.)

If this is not a successor plan, then, if checked ☐, for the first Plan Year this plan permits any participant to make Elective Deferrals, the ADP used in the ADP test for participants who are Non-highly Compensated Employees shall be such first Plan Year's ADP. (Do not check this box if the employer has elected in the adoption agreement to use the Current Year Testing method.)

[Note to reviewer: See LRM XII for Sample Adoption Agreement Language for current year/prior year testing option.]

(VII) DISTRIBUTION OF EXCESS CONTRIBUTIONS [Code  
§§ 401(k)(8) and 4979]

**Statement of Requirement:** Excess Contributions, plus any income and minus any loss allocable thereto, must be distributed no later than the last day of the Plan Year to participants to whose accounts such Excess Contributions were allocated for the preceding Plan Year. If such excess amounts are distributed more than 2 1/2 months after the last day of the Plan Year in which such excess amounts arose, then § 4979 of the Code imposes a 10-percent excise tax on the employer maintaining the plan with respect to such amounts.

**Sample Plan Language:**

Notwithstanding any other provision of the plan, Excess Contributions, plus any income and minus any loss allocable thereto, shall be distributed no later than the last day of each Plan Year to participants to whose accounts such Excess Contributions were allocated for the preceding Plan Year. Excess Contributions are allocated to the Highly Compensated Employees with the largest amounts of employer contributions taken into account in calculating the ADP test for the year in which the excess arose, beginning with the Highly Compensated Employee with the largest amount of such employer contributions and continuing in descending order until all the Excess Contributions have been allocated. For purposes of the preceding sentence, the "largest amount" is determined after distribution of any Excess Contributions. If such excess amounts are distributed more than 2 1/2 months after the last day of the Plan Year in which such excess amounts arose, a 10-percent excise tax will be imposed on the employer maintaining the plan with respect to such amounts.

Excess Contributions (including the amounts recharacterized) shall be treated as annual additions under the plan.

**Determination of Income or Loss:** Excess Contributions shall be adjusted for any income or loss up to the date of distribution. The income or loss allocable to Excess Contributions allocated to each participant is the sum of: (1) income or loss allocable to the participant's Elective Deferral account (and, if applicable, the Qualified Non-elective Contribution account or the Qualified Matching Contributions account or both) for the Plan Year multiplied by a fraction, the numerator of which is such participant's Excess Contributions for the year and the denominator is the participant's account balance attributable to Elective Deferrals (and Qualified Non-elective Contributions or Qualified Matching Contributions, or both, if any of such contributions are included in the ADP test) without regard to any income or loss occurring during such Plan Year; and (2) 10 percent of the amount determined under (1) multiplied by the number of whole calendar months between the end of the Plan Year and the date of distribution, counting the month of

distribution if distribution occurs after the 15th of such month.

**[Note to reviewer: A plan may use any reasonable method for computing the income or loss allocable to Excess Contributions, provided such method is used consistently for all participants and for all corrective distributions under the plan for the Plan Year, and is used by the plan for allocating income or loss to participants' accounts. Income or loss allocable to the period between the end of the Plan Year and the date of distribution may be disregarded in determining income or loss.]**

Accounting for Excess Contributions: Excess Contributions allocated to a participant shall be distributed from the participant's Elective Deferral account and Qualified Matching Contribution account (if applicable) in proportion to the participant's Elective Deferrals and Qualified Matching Contributions (to the extent used in the ADP test) for the Plan Year. Excess Contributions shall be distributed from the participant's Qualified Non-elective Contribution account only to the extent that such Excess Contributions exceed the balance in the participant's Elective Deferral account and Qualified Matching Contribution account.

Definition:

1. "Excess Contributions" shall mean, with respect to any Plan Year, the excess of:

a. The aggregate amount of employer contributions actually taken into account in computing the ADP of Highly Compensated Employees for such Plan Year, over

b. The maximum amount of such contributions permitted by the ADP test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of the ADPs, beginning with the highest of such percentages).

(VIII) RECHARACTERIZATION [Code § 401(k)(8)]

[Note to reviewer: A plan may only permit recharacterization where all participants are eligible to make Employee Contributions. Recharacterized amounts may be used in the plan from which Excess Contributions arose or in another plan of the employer with the same Plan Year. Excess Contributions may not be recharacterized by a Highly Compensated Employee to the extent that such amounts in combination with other Employee Contributions made by that employee would exceed any stated limit under the plan on Employee Contributions. Recharacterized amounts will be treated as employer contributions for purposes of §§ 404, 409, 411, 412, 415, 416, and 417 of the Code.]

**Sample Plan Language:**

A participant may treat Excess Contributions allocated to him or her as an amount distributed to the participant and then contributed by the participant to the plan. Recharacterized amounts will remain nonforfeitable. Amounts may not be recharacterized by a Highly Compensated Employee to the extent that such amount in combination with other Employee Contributions made by that employee would exceed any stated limit under the plan on Employee Contributions.

Recharacterization must occur no later than 2 1/2 months after the last day of the Plan Year in which such Excess Contributions arose and is deemed to occur no earlier than the date the last Highly Compensated Employee is informed in writing of the amount recharacterized and the consequences thereof. Recharacterized amounts will be taxable to the participant for the participant's taxable year in which the participant would have received them in cash.

**(IX) MATCHING CONTRIBUTIONS [Code § 401(m)]**

**Sample Plan Language:**

If elected by the employer in the adoption agreement, the employer will make Matching Contributions to the plan.

**Sample Adoption Agreement Language:**

The employer will make Matching Contributions to the plan on behalf of [ELECT ONE]:

☐ a. All participants

☐ b. All participants who are Non-highly Compensated Employees who make [ELECT ONE OR BOTH]:

☐ a. Elective Deferrals

☐ b. Employee Contributions

to the plan.

The employer shall contribute and allocate to each participant's Matching Contribution account an amount equal to:

☐ a. ☐ percent of the participant's Elective Deferrals.

☐ b. ☐ percent of the participant's Employee Contributions.

The employer shall not match amounts provided above in excess of [\$ ], or in excess of [ ] percent, of the participant's Compensation.

**[Note to reviewer: If a standardized plan includes a tiered matching formula, then the rate of Matching Contributions cannot increase as the rate of Elective Deferrals or Employee Contributions increases.]**

**(X) FORFEITURES AND VESTING OF MATCHING CONTRIBUTIONS**  
**[Code § 411(a)(2)] (Required if Matching**  
**Contributions are made.)**

**Statement of Requirement: Matching Contributions are subject to the minimum vesting requirements of § 411 of the Code. Section 411(a)(2) requires that a plan satisfies either a 5-year vesting schedule, or a 3-to-7 year vesting schedule.**

**Sample Plan Language:**

Matching Contributions shall be vested in accordance with section [ ] of the adoption agreement. In any event, Matching Contributions shall be fully vested at normal retirement age, upon the complete or partial termination of the profit-sharing plan, or upon the complete discontinuance of employer contributions.

Forfeitures of Matching Contributions, other than Excess Aggregate Contributions, shall be made in accordance with section [ ].

**[Note to reviewer: The blank space in the preceding paragraph should refer to the profit-sharing plan's forfeiture provisions applicable to employer contributions other than Elective Deferrals and Qualified Non-elective Contributions. In the alternative, a sponsor may provide for specific forfeiture language applicable only to Matching Contributions.]**

**Sample Adoption Agreement Language:**

Matching Contributions will be vested in accordance with the following schedule [ELECT ONE]:

[ ] a. Nonforfeitable when made.

[ ] b. The profit-sharing plan's general vesting schedule, other than that for Elective Deferrals.

[ ] c. **[The sponsor may add elections for one or more of the vesting schedules that comply with § 411(a)(2) of the Code.]**



**(XI) QUALIFIED MATCHING CONTRIBUTIONS [Code § 401(m)]**

**[Note: If the employer provides that all Matching Contributions will satisfy the conditions applicable to Qualified Matching Contributions, then separate accounting for Matching Contributions and Qualified Matching Contributions is not necessary.]**

**Sample Plan Language:**

If elected by the employer in the adoption agreement, the employer will make Qualified Matching Contributions to the plan.

**Definition:**

1. "Qualified Matching Contributions" shall mean Matching Contributions which are subject to the distribution and nonforfeitability requirements under § 401(k) of the Code when made.

**Sample Adoption Agreement Language:**

The employer will make Qualified Matching Contributions to the plan on behalf of [ELECT ONE]:

[ ] a. All participants

[ ] b. All participants who are Non-highly Compensated Employees

who make [ELECT ONE OR BOTH]:

[ ] a. Elective Deferrals

[ ] b. Employee Contributions

to the plan.

The employer shall contribute and allocate to each participant's Qualified Matching Contribution account an amount equal to:

[ ] a. [ ] percent of the participant's Elective Deferrals

[ ] b. [ ] percent of the participant's Employee Contributions

The employer shall not match amounts provided above in excess of [\$ ], or in excess of [ ] percent, of the participant's Compensation.

[Note to reviewer: If a standardized plan includes a tiered matching formula, then the rate of Qualified Matching Contributions cannot increase as the rate of Elective Deferrals or Employee Contributions increases.]

(XII) LIMITATIONS ON EMPLOYEE AND MATCHING CONTRIBUTIONS [Code §§ 401(a)(4) and 401(m); Notice 97-2, 1997-1 C.B. 348 and Notice 98-1, 1998-3 I.R.B. 42]

(Generally required in all plans where Matching Contributions are provided for -- unless the plan is designed to be a 401(k) SIMPLE plan or a Safe Harbor CODA -- or if Employee Contributions are permitted under the plan.)

Statement of Requirement: Employee Contributions and Matching Contributions must meet the nondiscrimination requirements of § 401(a)(4) of the Code, and the Average Contribution Percentage ("ACP") test of § 401(m). If Employee Contributions (including any Elective Deferrals recharacterized as Employee Contributions) or Matching Contributions are made in conjunction with a CODA, then the ACP test is in addition to the ADP test under § 401(k). Qualified Matching Contributions and Qualified Non-elective Contributions used to satisfy the ADP test may not be used to satisfy the ACP test.

**Sample Plan Language:**

Prior Year Testing

The Average Contribution Percentage ("ACP") for a Plan Year for participants who are Highly Compensated Employees for each Plan Year and the prior year's ACP for participants who were Non-highly Compensated Employees for the prior Plan Year must satisfy one of the following tests:

1. The ACP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ACP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 1.25; or
2. The ACP for a Plan Year for participants who are Highly Compensated Employees for the Plan Year shall not exceed the prior year's ACP for participants who were Non-highly Compensated Employees for the prior Plan Year multiplied by 2, provided that the ACP for participants who are Highly Compensated Employees does not exceed the ACP for participants who were Non-highly Compensated Employees in the prior Plan Year by more than 2 percentage points.

For the first Plan Year this plan permits any participant to make Employee Contributions, provides for Matching Contributions or both, and this is not a successor plan, for purposes of the foregoing tests, the prior year's Non-highly Compensated Employees' ACP shall be 3 percent unless the employer has elected in the adoption agreement to use the Plan Year's ACP for these participants.

#### Current Year Testing

If elected by the employer in the adoption agreement, the ACP tests in 1 and 2, above, will be applied by comparing the current Plan Year's ACP for participants who are Highly Compensated Employees for each Plan Year with the current Plan Year's ACP for participants who are Non-highly Compensated Employees. Once made, this election can only be undone if the plan meets the requirements for changing to Prior Year Testing set forth in Notice 98-1 (or superseding guidance).

#### Special Rules:

1. A participant is a Highly Compensated Employee for a particular Plan Year if he or she meets the definition of a Highly Compensated Employee in effect for that Plan Year.

Similarly, a participant is a Non-highly Compensated Employee for a particular Plan Year if he or she does not meet the definition of a Highly Compensated Employee in effect for that Plan Year.

2. Multiple Use: If one or more Highly Compensated Employees participate in both a CODA and a plan subject to the ACP test maintained by the employer and the sum of the ADP and ACP of those Highly Compensated Employees subject to either or both tests exceeds the Aggregate Limit, then the ACP of those Highly Compensated Employees who also participate in a CODA will be reduced in the manner described in section [ ] of the plan so that the limit is not exceeded. The amount by which each Highly Compensated Employee's Contribution Percentage Amounts is reduced shall be treated as an Excess Aggregate Contribution. The ADP and ACP of the Highly Compensated Employees are determined after any corrections required to meet the ADP and ACP tests and are deemed to be the maximum permitted under such tests for the Plan Year. Multiple use does not occur if either the ADP or the ACP of the Highly Compensated Employees does not exceed 1.25 multiplied by the ADP and ACP, respectively, of the Non-highly Compensated Employees.

3. For purposes of this section, the Contribution Percentage for any participant who is a Highly Compensated Employee and who is eligible to have Contribution Percentage Amounts allocated to his or her account under two or more plans described in § 401(a) of the Code, or arrangements described in § 401(k) of the Code that are maintained by the employer, shall be determined as if the total of such Contribution Percentage Amounts was made under each plan. If a Highly Compensated Employee participates in two or more cash or deferred arrangements that have different plan years, all cash or deferred arrangements ending with or within the same calendar year shall be treated as a single arrangement. Notwithstanding the foregoing, certain plans shall be treated as separate if mandatorily disaggregated under regulations under § 401(m) of the Code.

4. In the event that this plan satisfies the requirements of §§ 401(m), 401(a)(4) or 410(b) of the Code only if aggregated with one or more other plans, or if one or more other plans satisfy the requirements of such sections of the Code only if aggregated with this plan, then this section shall be applied by determining the ACP of employees as if all such plans were a single plan. Any adjustments to the Non-highly Compensated Employee ACP for the prior year will be made in accordance with Notice 98-1 and any superseding guidance, unless the employer has elected in the adoption agreement to use the Current Year Testing method. Plans may be aggregated in order to satisfy § 401(m) of the Code only if they have the same Plan Year and use the same ACP testing method.

5. For purposes of the ACP test, Employee Contributions are considered to have been made in the Plan Year in which contributed to the trust. Matching Contributions and Qualified Non-elective Contributions will be considered made for a Plan Year if made no later than the end of the 12-month period beginning on the day after the close of the Plan Year.

6. The employer shall maintain records sufficient to demonstrate satisfaction of the ACP test and the amount of Qualified Non-elective Contributions or Qualified Matching Contributions, or both, used in such test.

#### Definitions:

1. "Aggregate Limit" shall mean the sum of (i) 125 percent of the greater of the ADP of the Non-highly Compensated Employees for the prior Plan Year or the ACP of Non-highly Compensated Employees under the plan subject to Code § 401(m) for the Plan Year beginning with or within the prior Plan Year of the CODA and (ii) the lesser of 200 percent or 2 plus the lesser of such

ADP or ACP. "Lesser" is substituted for "greater" in "(i)", above, and "greater" is substituted for "lesser" after "2 plus the" in "(ii)" if it would result in a larger Aggregate Limit. If the employer has elected in the adoption agreement to use the Current Year Testing method, then, in calculating the Aggregate Limit for a particular Plan Year, the Non-highly Compensated Employees' ADP and ACP for that Plan Year, instead of for the prior Plan Year, is used.

2. "Average Contribution Percentage" shall mean the average of the Contribution Percentages of the Eligible Participants in a group.

3. "Contribution Percentage" shall mean the ratio (expressed as a percentage) of the participant's Contribution Percentage Amounts to the participant's Compensation for the Plan Year.

4. "Contribution Percentage Amounts" shall mean the sum of the Employee Contributions, Matching Contributions, and Qualified Matching Contributions (to the extent not taken into account for purposes of the ADP test) made under the plan on behalf of the participant for the Plan Year. Such Contribution Percentage Amounts shall not include Matching Contributions that are forfeited either to correct Excess Aggregate Contributions or because the contributions to which they relate are Excess Deferrals, Excess Contributions, or Excess Aggregate Contributions. If so elected in the adoption agreement the employer may include Qualified Non-elective Contributions in the Contribution Percentage Amounts. The employer also may elect to use Elective Deferrals in the Contribution Percentage Amounts so long as the ADP test is met before the Elective Deferrals are used in the ACP test and continues to be met following the exclusion of those Elective Deferrals that are used to meet the ACP test.

5. "Eligible Participant" shall mean any employee who is eligible to make an Employee Contribution, or an Elective Deferral (if the employer takes such contributions into account in the calculation of the Contribution Percentage), or to receive a Matching Contribution (including forfeitures) or a Qualified Matching Contribution. If an Employee Contribution is required as a condition of participation in the plan, any employee who would be a participant in the plan if such employee made such a contribution shall be treated as an eligible participant on behalf of whom no Employee Contributions are made.

6. "Employee Contribution" shall mean any contribution made to the plan by or on behalf of a participant that is included in the participant's gross income in the year in which made and that is maintained under a separate account to which earnings and losses are allocated.

7. "Matching Contribution" shall mean an employer contribution made to this or any other defined contribution plan on behalf of a participant on account of an Employee Contribution made by such participant, or on account of a participant's Elective Deferral, under a plan maintained by the employer.

**Sample Adoption Agreement Language:**

If this is not a successor plan, then, if checked [ ], for the first Plan Year this plan permits any participant to make Employee Contributions, provides for Matching Contributions or both, the ACP used in the ACP test for participants who are Non-highly Compensated Employees shall be such first Plan Year's ACP. (Do not check this box if the employer has elected in the adoption agreement to use the Current Year Testing method.)

[ ] If checked, this plan is using the Current Year Testing method for purposes of the ADP and ACP tests. (This box cannot be "unchecked" for a Plan Year unless (1) the plan has been using the Current Year Testing method for the preceding 5 Plan Years, or, if lesser, the number of Plan Years the plan has been in existence; or (2) the plan otherwise meets one of the conditions specified in Notice 98-1 (or superseding guidance) for changing from the Current Year Testing method.)

[Note to reviewer: An M&P plan must use the same testing method for both the ADP and ACP tests for Plan Years beginning on or after the date the employer adopts its GUST-restated M&P plan. See Rev. Proc. 2000-20, 2000-6 I.R.B. 553, § 5.182.]

**(XIII) DISTRIBUTION OF EXCESS AGGREGATE CONTRIBUTIONS**  
[Code §§ 401(m)(6) and 4979]

**Statement of Requirement:** Excess Aggregate Contributions must be distributed or forfeited before the close of the following Plan Year for qualification purposes. However, any excess amounts distributed more than 2 1/2 months after the last day of the Plan Year in which such excess amounts arose will be subject to a 10-percent excise tax under § 4979 of the Code. This tax is imposed on the employer with respect to such amounts.

**Sample Plan Language:**

Notwithstanding any other provision of the plan, Excess Aggregate Contributions, plus any income and minus any loss allocable thereto, shall be forfeited, if forfeitable, or if not forfeitable, distributed no later than the last day of each Plan Year to participants to whose accounts such Excess Aggregate Contributions were allocated for the preceding Plan Year. Excess Aggregate Contributions are allocated to the Highly Compensated Employees with the largest Contribution

Percentage Amounts taken into account in calculating the ACP test for the year in which the excess arose, beginning with the Highly Compensated Employee with the largest amount of such Contribution Percentage Amounts and continuing in descending order until all the Excess Aggregate Contributions have been allocated. For purposes of the preceding sentence, the "largest amount" is determined after distribution of any Excess Aggregate Contributions. If such Excess Aggregate Contributions are distributed more than 2 1/2 months after the last day of the Plan Year in which such excess amounts arose, a 10-percent excise tax will be imposed on the employer maintaining the plan with respect to those amounts. Excess Aggregate Contributions shall be treated as annual additions under the plan.

Determination of Income or Loss: Excess Aggregate Contributions shall be adjusted for any income or loss up to the date of distribution. The income or loss allocable to Excess Aggregate Contributions allocated to each participant is the sum of: (1) income or loss allocable to the participant's Employee Contribution account, Matching Contribution account, Qualified Matching Contribution Account (if any, and if all amounts therein are not used in the ADP test) and, if applicable, Qualified Non-elective Contribution account and Elective Deferral account for the Plan Year multiplied by a fraction, the numerator of which is such participant's Excess Aggregate Contributions for the year and the denominator is the participant's account balance(s) attributable to Contribution Percentage Amounts without regard to any income or loss occurring during such Plan Year; and (2) 10 percent of the amount determined under (1) multiplied by the number of whole calendar months between the end of the Plan Year and the date of distribution, counting the month of distribution if distribution occurs after the 15th of such month.

**[Note to reviewer: The plan may use any reasonable method for computing the income or loss allocable to Excess Aggregate Contributions, provided that such method is used consistently for all participants and for all corrective distributions under the plan for the Plan Year, and is used by the plan for allocating income or loss to participants' accounts. Income or loss allocable to the period between the end of the Plan Year and the date of distribution may be disregarded in determining income or loss.]**

Forfeitures of Excess Aggregate Contributions: Forfeitures of Excess Aggregate Contributions may either be reallocated to the accounts of Non-highly Compensated Employees or applied to reduce employer contributions, as elected by the employer in section [ ] of the adoption agreement.

Accounting for Excess Aggregate Contributions: Excess Aggregate Contributions allocated to a participant shall be forfeited, if forfeitable or distributed on a pro-rata basis from the participant's Employee Contribution account, Matching Contribution account, and Qualified Matching Contribution account (and, if applicable, the participant's Qualified Non-elective Contribution account or Elective Deferral account, or both).

Definitions:

1. "Excess Aggregate Contributions" shall mean, with respect to any Plan Year, the excess of:

a. The aggregate Contribution Percentage Amounts taken into account in computing the numerator of the Contribution Percentage actually made on behalf of Highly Compensated Employees for such Plan Year, over

b. The maximum Contribution Percentage Amounts permitted by the ACP test (determined by hypothetically reducing contributions made on behalf of Highly Compensated Employees in order of their Contribution Percentages beginning with the highest of such percentages).

Such determination shall be made after first determining Excess Elective Deferrals pursuant to section [ ] and then determining Excess Contributions pursuant to section [ ].

**Sample Adoption Agreement Language:**

In computing the Average Contribution Percentage, the employer shall take into account, and include as Contribution Percentage Amounts:

[ ] a. Elective Deferrals

[ ] b. Qualified Non-elective Contributions

under the plan or any other plan of the employer.

The amount of Qualified Non-elective Contributions that are made under section [ ] of the plan and taken into account as Contribution Percentage Amounts for purposes of calculating the Average Contribution Percentage shall be:

[ ] a. All such Qualified Non-elective Contributions.

[ ] b. Such Qualified Non-elective Contributions that are needed to meet the Average Contribution Percentage test stated in section [ ] of the plan. (Box b can only be checked if the employer has elected in the adoption agreement to use the Current Year Testing method.)



The amount of Elective Deferrals made under section [ ] of the plan and taken into account as Contribution Percentage Amounts for purposes of calculating the Average Contribution Percentage shall be:

[ ] a. All such Elective Deferrals.

[ ] b. Such Elective Deferrals that are needed to meet the Average Contribution Percentage test stated in section [ ] of the plan. (Box b can only be checked if the employer has elected in the adoption agreement to use the Current Year Testing method.)

Forfeitures of Excess Aggregate Contributions shall be:

[ ] a. Applied to reduce employer contributions for the Plan Year in which the excess arose, but allocated as in b, below, to the extent the excess exceeds employer contributions or the employer has already contributed for such Plan Year.

[ ] b. Allocated, after all other forfeitures under the plan, to the Matching Contribution account of each Non-highly Compensated Employee who made Elective Deferrals or Employee Contributions in the ratio which each such employee's Compensation for the Plan Year bears to the total Compensation of all such employees for such Plan Year.

**(XIV) QUALIFIED NON-ELECTIVE CONTRIBUTIONS**  
**[Regs. § 1.401(k)-1(b)(5)(i)]**

**Sample Plan Language:**

The employer may elect to make Qualified Non-elective Contributions under the plan on behalf of employees as provided in the adoption agreement.

In addition, if the employer has elected in the adoption agreement to use the Current Year Testing method, in lieu of distributing Excess Contributions as provided in section [ ] of the plan, or Excess Aggregate Contributions as provided in section [ ] of the plan, and to the extent elected by the employer in the adoption agreement, the employer may make Qualified Non-elective Contributions on behalf of participants that are sufficient to satisfy either the Actual Deferral Percentage test or the Average Contribution Percentage test, or both.

Definition:

1. "Qualified Non-elective Contributions" shall mean contributions (other than Matching Contributions or Qualified Matching Contributions) made by the employer and allocated to participants' accounts that the participants may not elect to receive in cash until distributed from the plan; that are nonforfeitable when made; and that are distributable only in accordance with the distribution provisions that are applicable to Elective Deferrals and Qualified Matching Contributions.

**Sample Adoption Agreement Language:**

The employer [ELECT ONE] [ ] will [ ] will not make Qualified Non-elective Contributions to the plan. If the employer does make such contributions to the plan, then the amount of such contributions for each Plan Year shall be [ELECT ONE]:

[ ] a. [ ] percent (not to exceed 15 percent) of the Compensation of all participants eligible to share in the allocation.

[ ] b. [ ] percent of the net profits, but in no event more than [\$ ] for any Plan Year.

[ ] c. An amount determined by the employer.

Allocation of Qualified Non-elective Contributions shall be made to the accounts of [ELECT ONE]:

[ ] a. All participants.

[ ] b. Only participants who are Non-highly Compensated Employees.

Allocation of Qualified Non-elective Contributions shall be made [ELECT ONE]:

[ ] a. In the ratio which each participant's Compensation for the Plan Year bears to the total Compensation of all participants for such Plan Year.

[ ] b. In the ratio which each participant's Compensation not in excess of [\$ ] for the Plan Year bears to the total Compensation of all participants not in excess of [\$ ] for such Plan Year.

**(XV) NONFORFEITABILITY AND VESTING [Code §§ 401(k)(2)(C), 401(m)(4)(C)(ii), and 411(a)(3)]**

**Statement of Requirement:** An employee's right to his or her accrued benefit derived from employee contributions and Elective Deferrals made pursuant to his or her election must be nonforfeitable. Qualified Non-elective Contributions and Qualified Matching Contributions must be nonforfeitable when made.

**Sample Plan Language:**

The participant's accrued benefit derived from Elective Deferrals, Qualified Non-elective Contributions, Employee Contributions, and Qualified Matching Contributions is nonforfeitable. Separate accounts for Elective Deferrals, Qualified Non-elective Contributions, Employee Contributions, Matching Contributions, and Qualified Matching Contributions will be maintained for each participant. Each account will be credited with the applicable contributions and earnings thereon.

**[Note to reviewer: Matching Contributions (including Qualified Matching Contributions) must be forfeited if the contributions to which they relate are Excess Deferrals (unless the Excess Deferrals are for nonhighly compensated employees), Excess Contributions, or Excess Aggregate Contributions.]**

**(XVI) DISTRIBUTION REQUIREMENTS [Code § 401(k)(2)(B)]**

**Statement of Requirement:** Elective Deferrals, Qualified Non-elective Contributions, and Qualified Matching Contributions, and income allocable to each, must comply with the distribution requirements under § 401(k)(2)(B) of the Code.

**Sample Plan Language:**

Elective Deferrals, Qualified Non-elective Contributions, and Qualified Matching Contributions, and income allocable to each are not distributable to a participant or his or her beneficiary or beneficiaries, in accordance with such participant's or beneficiary or beneficiaries election, earlier than upon separation from service, death, or disability.

**[Note to Reviewer: The following distributable events may be included in either the basic plan document or as elective provisions in the adoption agreement.]**

Such amounts may also be distributed upon:

1. Termination of the plan without the establishment of another defined contribution plan, other than an employee stock ownership plan (defined in § 4975(e)(7) of the Code), a simplified employee pension plan (defined in § 408(k)) or a SIMPLE IRA Plan (defined in § 408(p)).

2. The disposition by a corporation to an unrelated corporation of substantially all of the assets (within the meaning of § 409(d)(2) of the Code) used in a trade or business of such corporation if such corporation continues to maintain the plan after the disposition, but only with respect to employees who continue employment with the corporation acquiring such assets.

3. The disposition by a corporation to an unrelated entity of such corporation's interest in a subsidiary (within the meaning of § 409(d)(3) of the Code) if such corporation continues to maintain the plan, but only with respect to employees who continue employment with such subsidiary.

4. The attainment of age 59 1/2 in the case of a profit-sharing plan.

5. The hardship of the participant as described in section [    ].

**[Note to Reviewer: The blank should contain the section of the plan that corresponds to LRM XVII.]**

All distributions that may be made pursuant to one or more of the foregoing distributable events are subject to the spousal and participant consent requirements (if applicable) contained in §§ 401(a)(11) and 417 of the Code. In addition, distributions that are triggered by any of the first three events enumerated above must be made in a lump sum.

(XVII) **HARDSHIP DISTRIBUTIONS** [Code § 401(k)(2)(B) and  
Regs. § 1.401(k)-1(d)(2); Rev. Proc. 2000-20, 2000-6  
I.R.B. 553, § 5.183]

[Note to Reviewer: A profit-sharing plan may permit distribution of Elective Deferrals (but not earnings thereon, nor of Qualified Non-elective Contributions and Qualified Matching Contributions) on account of financial hardship only under the deeming rules contained in the regulations under § 401(k) of the Code. However, the plan may provide that amounts eligible for such distribution include earnings on Elective Deferrals and the amount credited to the participant's Qualified Matching Contributions and Qualified Non-elective Contributions accounts as of December 31, 1988, or, if later, the end of the last Plan Year ending before July 1, 1989.]

**Sample Plan Language:**

Distribution of Elective Deferrals (and any earnings credited to a participant's Elective Deferral account as of the later of December 31, 1988, and the end of the last Plan Year ending before July 1, 1989) may be made to a participant in the event of hardship. For the purposes of this section, hardship is defined as an immediate and heavy financial need of the employee where such employee lacks other available resources. Hardship distributions are subject to the spousal consent requirements contained in §§ 401(a)(11) and 417 of the Code.

**Special Rules:**

1. The following are the only financial needs considered immediate and heavy: expenses incurred or necessary for medical care, described in § 213(d) of the Code, of the employee, the employee's spouse or dependents; the purchase (excluding mortgage payments) of a principal residence for the employee; payment of tuition and related educational fees for the next 12 months of post-secondary education for the employee, the employee's spouse, children or dependents; or the need to prevent the eviction of the employee from, or a foreclosure on the mortgage of, the employee's principal residence.

2. A distribution will be considered as necessary to satisfy an immediate and heavy financial need of the employee only if:

a. The employee has obtained all distributions, other than hardship distributions, and all nontaxable loans under all plans maintained by the employer;

b. All plans maintained by the employer provide that the employee's Elective Deferrals (and Employee Contributions) will be suspended for 12 months after the receipt of the hardship distribution;

c. The distribution is not in excess of the amount of an immediate and heavy financial need (including amounts necessary to pay any federal, state or local income taxes or penalties reasonably anticipated to result from the distribution); and

d. All plans maintained by the employer provide that the employee may not make Elective Deferrals for the employee's taxable year immediately following the taxable year of the hardship distribution in excess of the applicable limit under § 402(g) of the Code for such taxable year less the amount of such employee's Elective Deferrals for the taxable year of the hardship distribution.

#### **(XVIII) TOP-HEAVY REQUIREMENTS**

**Statement of Requirement:** Neither Elective Deferrals nor Matching Contributions may be taken into account for the purpose of satisfying the minimum top-heavy contribution requirement.

(XIX) 401(k) SIMPLE PROVISIONS [Code §§ 401(k)(11) and 401(m)(10); Rev. Proc. 97-9, 1997-1 C.B. 624]  
(Required only in plans offering the application of the 401(k) SIMPLE Provisions.)

**Sample Plan Language:**

Article [ ] 401(k) SIMPLE Provisions

Section 1. Rules of Application

1.1 If the employer has elected in the adoption agreement to have the 401(k) SIMPLE Provisions apply, then the provisions of this article shall apply for a Year only if (a) the employer is an Eligible Employer and (b) no contributions are made, or benefits accrued for services during the Year, on behalf of any Eligible Employee under any other plan, contract, pension, or trust described in § 219(g)(5)(A) or (B), maintained by the employer.

1.2 To the extent that any other provision of the plan is inconsistent with the provisions of this article, the provisions of this article govern.

Section 2. Definitions

2.1 "Compensation" means, for purposes of Sections 2.2, 3.1 and 3.2 of this article, the sum of the wages, tips, and other compensation from the employer subject to federal income tax withholding (as described in § 6051(a)(3)) and the employee's salary reduction contributions made under this or any other § 401(k) plan, and, if applicable, elective deferrals under a § 408(p) SIMPLE IRA Plan, a SARSEP, or a § 403(b) annuity contract and compensation deferred under a § 457 plan, required to be reported by the employer on Form W-2 (as described in § 6051(a)(8)). For self-employed individuals, compensation means net earnings from self-employment determined under § 1402(a) prior to subtracting any contributions made under this plan on behalf of the individual. The provisions of the plan implementing the limit on compensation under § 401(a)(17) apply to the compensation under Section III of this article.

2.2 An Eligible Employer means, with respect to any Year, an employer that had no more than 100 employees who received at least \$5,000 of compensation from the employer for the preceding Year. In applying the preceding sentence, all employees of controlled groups of corporations under § 414(b), all employees of trades or businesses (whether incorporated or not) under common control under § 414(c), all employees of affiliated service groups under § 414(m), and leased employees required to be treated as the employer's employees under § 414(n), are taken into account.

An Eligible Employer that elects to have the 401(k) SIMPLE Provisions apply to the plan and that fails to be an Eligible Employer for any subsequent Year, is treated as an Eligible Employer for the 2 Years following the last Year the employer was an Eligible Employer. If the failure is due to any acquisition, disposition, or similar transaction involving an Eligible Employer, the preceding sentence applies only if the provisions of § 410(b)(6)(C)(i) are satisfied.

2.3 "Eligible Employee" means, for purposes of the 401(k) SIMPLE Provisions, any employee who is entitled to make Elective Deferrals under the terms of the plan.

2.4 "Year" means the calendar year.

### Section 3. Contributions

#### 3.1 Salary Reduction Contributions

(a) Each Eligible Employee may make a salary reduction election to have his or her Compensation reduced for the Year in any amount selected by the employee subject to the limitation in Section 3.1(b) of this article. The employer will make a salary reduction contribution to the plan, as an Elective Deferral, in the amount by which the employee's Compensation has been reduced.

(b) The total salary reduction contribution for the Year cannot exceed \$6,000 for any employee. To the extent permitted by law, this amount will be adjusted to reflect any annual cost-of-living increases announced by the IRS.

#### 3.2 Other Contributions

(a) Matching Contributions - Each Year, the employer will contribute a Matching Contribution to the plan on behalf of each employee who makes a salary reduction election under Section 3.1. The amount of the Matching Contribution will be equal to the employee's salary reduction contribution up to a limit of 3 percent of the employee's Compensation for the full Year.

(b) Nonelective Contribution - For any Year, instead of a Matching Contribution, the employer may elect to contribute a nonelective contribution of 2 percent of Compensation for the full Year for each Eligible Employee who received at least \$5,000 of Compensation (or such lesser amount as elected by the employer in the adoption agreement) for the Year.



### 3.3 Limitation on Other Contributions

No employer or employee contributions may be made to this plan for the Year other than salary reduction contributions described in Section 3.1, Matching or nonelective contributions described in Section 3.2 and rollover contributions described in Regulations § 1.402(c)-2, Q&A-1(a).

3.4 The provisions of the plan implementing the limitations of § 415 apply to contributions made pursuant to Sections 3.1 and 3.2.

## Section 4. Election and Notice Requirements

### 4.1 Election Period

(a) In addition to any other election periods provided under the plan, each Eligible Employee may make or modify a salary reduction election during the 60-day period immediately preceding each January 1.

(b) For the Year an employee becomes eligible to make salary reduction contributions under the 401(k) SIMPLE Provisions, the 60-day election period requirement of Section 4.1(a) is deemed satisfied if the employee may make or modify a salary reduction election during a 60-day period that includes either the date the employee becomes eligible or the day before.

(c) Each employee may terminate a salary reduction election at any time during the Year.

### 4.2 Notice Requirements

(a) The employer will notify each Eligible Employee prior to the 60-day election period described in Section 4.1 that he or she can make a salary reduction election or modify a prior election during that period.

(b) The notification described in Section 4.2(a) will indicate whether the employer will provide a 3-percent Matching Contribution described in Section 3.2(a) or a 2-percent nonelective contribution described in Section 3.2(b).

## Section 5. Vesting Requirements

All benefits attributable to contributions described in Section 3.1 and 3.2 are nonforfeitable at all times, and all previous contributions made under the plan are nonforfeitable as of the beginning of the Year the 401(k) SIMPLE Provisions apply.

## Section 6. Top-Heavy Rules

The plan is not treated as a top-heavy plan under § 416 for any Year for which this article applies.

## Section 7. Nondiscrimination Tests

The ADP and ACP tests described in sections [ ] and [ ] of the plan are treated as satisfied for any Year for which this article applies.

### **Sample Adoption Agreement Language:**

#### 401(k) SIMPLE Provisions

[ ] By checking this box the employer elects to have the 401(k) SIMPLE Provisions described in Article [ ] apply to the plan. (This box may only be checked if the plan uses a calendar-year plan year and the employer is an Eligible Employer as defined in Section 2.2 of Article [ ].) An amendment to have the 401(k) SIMPLE Provisions no longer apply is effective the next January 1.

The nonelective contribution described in Section 3.2(b) of the plan will be allocated to all Eligible Employees who received at least [\$ ] [INSERT AN AMOUNT LESS THAN \$5,000] Compensation for the Year.

(XX) **SAFE HARBOR METHOD CODA** [Code §§ 401(k) and 401(m); Notice 98-52, 1998-46 I.R.B. 16; Notice 2000-3, 2000-4 I.R.B. 413; and Rev. Proc. 2000, 2000-6 I.R.B. 553] (Required only in plans offering a Safe Harbor CODA.)

**Statement of Requirement:** LRM XX is required only in a plan offering the design-based safe harbor methods for satisfying the ADP test or the ADP and ACP tests (a "Safe Harbor CODA"). A plan that satisfies the ADP/ACP test safe harbors must satisfy all the other applicable requirements of the Code, including the other requirements of § 401(k), the nondiscriminatory availability of benefits, rights, and features under § 401(a)(4), and the limitations of §§ 401(a)(17), 401(a)(30), and 415.

The ADP test safe harbor requires that a plan meet certain contribution requirements (matching or nonelective) and a notice requirement. The ACP test safe harbor requires that a plan meet the contribution and notice requirements of the ADP test safe harbor and, in addition, satisfy a special limit on Matching Contributions.

A plan providing for Employee Contributions, or Matching Contributions that fail to satisfy the ACP test safe harbor, must satisfy the regular ACP test under § 401(m)(2). See Notice 98-52 and Notice 2000-3 (and any superseding guidance) for details.

[Note to Reviewer: This LRM XX may be used without the CODA LRMs or portions of the CODA LRMs that do not apply when the plan is using the safe harbors to satisfy the ADP and ACP tests; for example, LRMs VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, and XIX can be omitted in their entirety if only safe harbor contributions can be made under the plan. A Safe Harbor CODA must satisfy the requirements of CODA LRMs I, II (first sentence only), III, IV, V, XVI (only for Elective Deferrals and only for the enumerated distributable events permitted under the plan), XVII (if the plan permits hardship distributions of Elective Deferrals) and XVIII. However, if pursuant to Q&A-1 of Notice 2000-3 the plan provides an option whereby the plan can be amended by the employer during a Plan Year to become a Safe Harbor CODA for that Plan Year using Safe Harbor Nonelective Contributions, the plan must contain the CODA LRMs appropriate for a CODA that is not using the safe harbors, as well as this LRM XX, both as modified to meet the requirements of Q&A-1. Also, if pursuant to Q&A-6 of Notice 2000-3 the plan provides an option whereby a Safe Harbor CODA using Safe Harbor Matching Contributions can be amended by the employer during a Plan Year to prospectively eliminate the Safe Harbor Matching Contributions and become a regular CODA using the current year ADP/ACP testing method for the entire Plan Year, then the plan must contain the CODA LRMs appropriate for a CODA that is not using the safe harbors, as well as this LRM XX, both as modified to meet the requirements of Q&A-6.]

**Sample Plan Language:**

Article [ ] Safe Harbor CODA

Section 1. Rules of Application

1.1 If the employer has elected the Safe Harbor CODA option in the adoption agreement, the provisions of this article shall apply for the Plan Year and any provisions relating to the ADP test described in § 401(k)(3) of the Code or the ACP test described in § 401(m)(2) of the Code do not apply.

[Note to Reviewer: This LRM XX provides sample plan language for plans using the safe harbor methods to satisfy the ADP and ACP tests. If Matching Contributions that do not satisfy the ACP Test Safe Harbor or Employee Contributions can be made under the plan, then this language, including that in Section 1.1 above, will have to be modified to satisfy the relevant portions of LRMs XII and XIII using the Current Year Testing method and specifying which contributions will be used in the ACP test. See section VIII.F of Notice 98-52.]

1.2 To the extent that any other provision of the plan is inconsistent with the provisions of this article, the provisions of this article govern.

## Section 2. Definitions

2.1 "ACP Test Safe Harbor" is the method described in Section 4 of this article for satisfying the ACP test of § 401(m)(2) of the Code.

2.2 "ACP Test Safe Harbor Matching Contributions" are Matching Contributions described in Section 4.1 of this article.

2.3 "ADP Test Safe Harbor" is the method described in Section 3 of this article for satisfying the ADP test of § 401(k)(3) of the Code.

2.4 "ADP Test Safe Harbor Contributions" are Matching Contributions and nonelective contributions described in Section 3.1 of this article.

2.5 "Compensation" is defined in \_\_\_\_\_ of the plan, except, for purposes of this article, no dollar limit, other than the limit imposed by § 401(a)(17) of the Code, applies to the compensation of a Non-highly Compensated Employee. However, solely for purposes of determining the compensation subject to a participant's deferral election, the employer may use an alternative definition to the one described in the preceding sentence, provided such alternative definition is a reasonable definition within the meaning of § 1.414(s)-1(d)(2) of the regulations and permits each participant to elect sufficient Elective Deferrals to receive the maximum amount of Matching Contributions (determined using the definition of compensation described in the preceding sentence) available to the participant under the plan.

**[Note to Reviewer: The blank should contain the location of the plan's definition of compensation that corresponds to DC LRM 6.]**

2.6 "Eligible Employee" means an employee eligible to make Elective Deferrals under the plan for any part of the Plan Year or who would be eligible to make Elective Deferrals but for a suspension due to a hardship distribution described in \_\_\_\_\_ of the plan or to statutory limitations, such as §§ 402(g) and 415 of the Code.

**[Note to Reviewer: The blank should contain the location of the plan's hardship distribution provisions that correspond to LRM XVII, and any suspension periods may not exceed those in LRM XVII. The plan may not condition an Eligible Employee's receipt of ADP Test Safe Harbor Contributions or ACP Test Safe Harbor Matching Contributions on completion of a certain number of hours during the Plan Year or on employment on a certain day during the Plan Year.]**

2.7 "Matching Contributions" are contributions made by the employer on account of an Eligible Employee's Elective Deferrals.

### Section 3. ADP Test Safe Harbor

#### 3.1 ADP Test Safe Harbor Contributions

(a) Unless the employer elects in the adoption agreement to make Enhanced Matching Contributions or Safe Harbor Nonelective Contributions, the employer will contribute for the Plan Year a Safe Harbor Matching Contribution to the plan on behalf of each Eligible Employee equal to (i) 100 percent of the amount of the employee's Elective Deferrals that do not exceed 3 percent of the employee's Compensation for the Plan Year, plus (ii) 50 percent of the amount of the employee's Elective Deferrals that exceed 3 percent of the employee's Compensation but that do not exceed 5 percent of the employee's Compensation ("Basic Matching Contributions").

(b) Notwithstanding the requirement in (a) above that the employer make the ADP Test Safe Harbor Contributions to this plan, if the employer so provides in the adoption agreement, the ADP Test Safe Harbor Contributions will be made to the defined contribution plan indicated in the adoption agreement. However, such contributions will be made to this plan unless (i) each employee eligible under this plan is also eligible under the other plan and (ii) the other plan has the same Plan Year as this plan.

**[Note to reviewer: The option to make ADP Test Safe Harbor Contributions to another defined contribution plan is permitted only if this plan is a nonstandardized plan or a plan that is paired with the other defined contribution plan.]**

(c) The participant's accrued benefit derived from ADP Test Safe Harbor Contributions is nonforfeitable and may not be distributed earlier than separation from service, death, disability, an event described in § 401(k)(10) of the Code, or, in the case of a profit-sharing plan, the attainment of age 59-1/2. In addition, such contributions must satisfy the ADP Test Safe Harbor without regard to permitted disparity under § 401(l).

**[Note to Reviewer: The events described in § 401(k)(10) are listed as items 1 through 3 in LRM XVI. ADP Test Safe Harbor Contributions may not be distributed on account of hardship.]**

### 3.2 Notice Requirement

At least 30 days, but not more than 90 days, before the beginning of the Plan Year, the employer will provide each Eligible Employee a comprehensive notice of the employee's rights and obligations under the plan, written in a manner calculated to be understood by the average Eligible Employee. If an employee becomes eligible after the 90th day before the beginning of the Plan Year and does not receive the notice for that reason, the notice must be provided no more than 90 days before the employee becomes eligible but not later than the date the employee becomes eligible.

### 3.3 Election Periods

In addition to any other election periods provided under the plan, each Eligible Employee may make or modify a deferral election during the 30-day period immediately following receipt of the notice described in section 3.2 above.

## Section 4. ACP Test Safe Harbor

### 4.1 ACP Test Safe Harbor Matching Contributions

(a) In addition to the ADP Test Safe Harbor Contributions described in Section 3.1 of this article, the employer will make the ACP Test Safe Harbor Matching Contributions, if any, indicated in the adoption agreement for the Plan Year.

(b) ACP Test Safe Harbor Matching Contributions will be vested as indicated in the adoption agreement, but, in any event, such contributions shall be fully vested at normal retirement age, upon the complete or partial termination of the plan, or upon the complete discontinuance of employer contributions. Forfeitures of nonvested ACP Test Safe Harbor Matching Contributions will be used to reduce the employer's contribution.

**[Note to Reviewer: Other language specifying the use of such forfeitures may also be acceptable.]**

**Sample Adoption Agreement Language:**

Article [ ] Safe Harbor CODA Provisions

[ ] If checked, the Safe Harbor CODA provisions of Article  
[ ] apply.

Section 3. ADP Test Safe Harbor Contributions

In lieu of Basic Matching Contributions, the employer will make the following contributions for the Plan Year [SELECT EITHER OR BOTH]:

[ ] Enhanced Matching Contributions

The employer will make Matching Contributions to the account of each Eligible Employee in an amount equal to the sum of:

(i) the employee's Elective Deferrals that do not exceed \_\_\_\_ percent of the employee's Compensation for the Plan Year plus

(ii) \_\_\_\_ percent of the employee's Elective Deferrals that exceed \_\_\_\_ percent of the employee's Compensation for the Plan Year and that do not exceed \_\_\_\_ percent of the employee's Compensation for the Plan Year.

[IN THE BLANK IN (i) AND THE SECOND BLANK IN (ii), INSERT A NUMBER THAT IS 3 OR GREATER BUT NOT GREATER THAN 6. THE FIRST AND LAST BLANKS IN (ii) MUST BE COMPLETED SO THAT, AT ANY RATE OF ELECTIVE DEFERRALS, THE MATCHING CONTRIBUTION IS AT LEAST EQUAL TO THE MATCHING CONTRIBUTION RECEIVABLE IF THE EMPLOYER WERE MAKING BASIC MATCHING CONTRIBUTIONS, BUT THE RATE OF MATCH CANNOT INCREASE AS DEFERRALS INCREASE. FOR EXAMPLE, IF "4" IS INSERTED IN THE BLANK IN (i), (ii) NEED NOT BE COMPLETED.]

[ ] Safe Harbor Nonelective Contributions

The employer will make a Safe Harbor Nonelective Contribution to the account of each Eligible Employee in an amount equal to 3 percent of the employee's Compensation for the Plan Year, unless the employer inserts a greater percentage here \_\_\_\_\_.

[ ] If checked, the ADP Test Safe Harbor Contributions will be made to \_\_\_\_\_. [INSERT NAME OF DEFINED CONTRIBUTION PLAN OF EMPLOYER]

**[Note to reviewer: The option to make ADP Test Safe Harbor Contributions to another defined contribution plan is permitted**

**only if this plan is a nonstandardized plan or a plan that is paired with the other defined contribution plan.]**

**Section 4. ACP Test Safe Harbor Matching Contributions**

[NO ADDITIONAL CONTRIBUTIONS ARE REQUIRED IN ORDER TO SATISFY THE REQUIREMENTS FOR A SAFE HARBOR CODA. HOWEVER, IF THE EMPLOYER DESIRES TO MAKE MATCHING CONTRIBUTIONS OTHER THAN BASIC OR ENHANCED MATCHING CONTRIBUTIONS, THEN COMPLETE THE FOLLOWING.]

For the Plan Year, the employer will make ACP Test Safe Harbor Matching Contributions to the account of each Eligible Employee in the amount of [ELECT ONE]:

[ ] a. \_\_\_\_ percent of the employee's Elective Deferrals that do not exceed 6 percent of the employee's Compensation for the Plan Year.

[ ] b. \_\_\_\_ percent of the employee's Elective Deferrals that do not exceed \_\_\_\_ percent of the employee's Compensation for the Plan Year plus \_\_\_\_ percent of the employee's Elective Deferrals thereafter, but no Matching Contributions will be made on Elective Deferrals that exceed 6 percent of Compensation. [THE NUMBER INSERTED IN THE THIRD BLANK CANNOT EXCEED THE NUMBER INSERTED IN THE FIRST BLANK.]

[ ] c. the employee's Elective Deferrals that do not exceed a percentage of the employee's Compensation for the Plan Year. Such percentage is determined by the employer for the year but in no event can exceed 4 percent of the employee's Compensation.

**[Note to Reviewer: Other formulas for ACP Test Safe Harbor Matching Contributions are permissible, provided (i) Matching Contributions are not made on Elective Deferrals in excess of 6 percent of Compensation (ii) the amount of Matching Contributions subject to the employer's discretion cannot exceed 4 percent of Compensation, (iii) no HCE can receive a greater rate of Matching Contributions than an NHCE at the same rate of Elective Deferrals, and (iv) the rate of Matching Contributions cannot increase as a participant's Elective Deferrals increase.]**

**Vesting of ACP Test Safe Harbor Matching Contributions**

ACP Test Safe Harbor Matching Contributions will be vested in accordance with the following schedule:

**[Note to Reviewer: Vesting schedules must comply with § 411(a)(2) of the Code and, if the plan is top-heavy, § 416(b) of the Code.]**





